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IN THE

Supreme Court of the United States

GUY MITCHELL, *et al.*,
Petitioners,

v.

MARY L. HELMS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. LEGAL INQUIRY INTO A SCHOOL'S "SECTARIAN" CHARACTER ORIGINATED IN THE RELIGIOUS CONFLICTS OF THE NINETEENTH CENTURY 6

A. Nineteenth Century "Common Schools" Inculcated Students with the Protestant "Common Religion," Thus Distinguishing Themselves From "Sectarian" Schools 6

B. A Backlash Against 19th Century Irish and East-European Immigration Led To A Variety of Official Manifestations of Anti-Catholic Bigotry, Including the So-Called Blaine Amendments, Directed at "Sectarian" Schools. 9

C. Nineteenth and Early Twentieth Century State Court Litigation Reinforced the Distinction Between "Common" and "Sectarian" Schools ... 15

II. THIS COURT SHOULD RECONSIDER ITS ADOPTION OF THE "NO-AID-TO-SECTARIAN-SCHOOLS" RHETORIC AS AN ANALYTICAL CATEGORY. 20

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 5, 23
Billard v. Board of Education, 76 P. 422 (Kan. 1904) ... 19
Board of Education of Central School Dist. No. 1 v. Allen, 392 U.S. 236 (1968) 22
Board of Education v. Minor, 23 Ohio St. 211 (1872) ... 11
Boyette v. Galvin, No. 98-CV-10377 (D. Mass. filed Mar. 3, 1998) 2, 14
Church v. Bullock, 109 S.W. 115 (Tex. 1908) 18
Columbia Union College v. Clark, 119 S. Ct. 2357 (1999) 5, 23
Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 22
Commonwealth v. Board of Educ. of Methodist Episcopal Church, 179 S.W. 596 (Ky. 1915) 19
Conrad v. City of Denver, 656 P.2d 662 (Colo. 1983) ... 17
Cook Cy. v. Chicago Industrial School for Girls, 18 N.E. 183 (Ill. 1888) 16
Derry Council, No. 40 , Junior Order United American Mechanics v. State Council of Pennsylvania, 47 A. 208 (Pa. 1900) 14
Evans v. Selma Union High School Dist., 222 P. 801 (Cal. 1924) 17
Everson v. Board of Educ., 330 U.S. 1 (1947) 20
Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) . 22
Hackett v. Brooksville Graded School Dist., 87 S.W. 792 (Ky. 1905) 19
Hale v. Everett, 53 N.H. 9 (1868) 6, 7
Helms v. Picard, 151 F.3d 347 (5th Cir. 1998) 2, 5
Judd v. Board of Education of Union Free School Dist., 15 N.E.2d 576 (N.Y. 1938) 16
Kaplan v. Independent School Dist., 214 N.W. 18 (Minn. 1927) 18
Knowlton v. Baumhover, 166 N.W. 202 (Iowa 1918) ... 18
Kotterman v. Killian, 972 P.2d 606 (Az. 1999), *petition for cert. filed*, 67 U.S.L.W. 3671 (U.S. Apr. 26, 1999) 3, 13, 14
Lemon v. Kurtzman, 403 U.S. 602 (1971) 9, 11, 21
McCormick v. Burt, 95 Ill. 263 (1880) 19
Meek v. Pittenger, 421 U.S. 349 (1975) 22
Moore v. Monroe, 20 N.W. 475 (Iowa 1884) 18
Nevada ex rel. Nevada Orphan Asylum v. Hallock, 16 Nev. 373 (1882) 13, 16
North v. Board of Trustees of University of Illinois, 27 N.E. 54 (Ill. 1891) 20
O'Connor v. Hendrick, 77 N.E. 612 (N.Y. 1906) 16
People ex rel. Ring v. Board of Education of Dist. 24, 92 N.E. 251 (Ill. 1910) 17, 19
People ex rel. Vollmar v. Stanley, 255 P. 610 (Colo. 1927) 4, 17
Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995) 5, 23
Smith v. Donahue, 195 N.Y.S. 715 (N.Y. App. Div. 1922) 16
Spiller v. Inhabitants of Woburn, 12 Allen 127 (Mass. 1866) 19
State ex rel. Finger v. Weedman, 226 N.W. 348 (S.D. 1929) 11, 17
State v. Scheve, 93 N.W. 169 (Neb. 1903) 4, 19
Stevenson v. Hanyon, 7 Pa. Dist. R. 585 (1898) 7
Tash v. Ludden, 129 N.W. 417 (Neb. 1911) 19
The Dublin Case, 38 N.H. 459 (1859) 6
Vidal v. Girard's Ex'rs, 43 U.S. 127 (1844) 8
Warde v. Manchester, 56 N.H. 508 (1876) 7
Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986) 5, 23
Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) 5, 23

CONSTITUTIONAL PROVISIONS

ARIZ. CONST. Art. IX § 10 13
DEL. CONST. Art. X § 3 12
IDAHO CONST. Art. X § 5 13
IOWA CONST. Art. 1, § 3 18
KY. CONST. § 189 12
MASS. CONST. Amend. Art. XLVI 10
MASS. CONST. Amend. Art. XVIII 10
MO. CONST. Art. IX § 8 12
MONT. CONST. ART. X § 6 13
N.D. CONST. Art. 8, § 5 13
N.Y. CONST. Art. XI § 3 12
S.D. CONST. Art. VIII § 16 13
WASH. CONST. Arts. IX § 4, Art. I § 11 13

STATUTES

Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) 13
Act of July 3, 1890, 26 Stat. L. 215 § 8, ch. 656 (1890) .. 13
Act of June 20, 1910, 36 Stat. 557 § 26 (1910) 13
Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 7301, *et seq.* 2, 5

MISCELLANEOUS

E.I.F. WILLIAMS, HORACE MANN: EDUCATIONAL STATESMAN (1937) 7
Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992) 12
HORACE MANN, LIFE AND WORKS: ANNUAL REPORTS OF THE SECRETARY OF THE BOARD OF EDUCATION OF MASSACHUSETTS FOR THE YEARS 1845-1848 (1891) 7, 8
HUMPHREY J. DESMOND, THE A.P.A. MOVEMENT, A SKETCH (1912) 15
JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925 (1987) 10, 12
KINZER, AN EPISODE IN ANTI-CATHOLICISM (1964) 14
Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997) 13, 14
Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J. OF LAW, ETHICS & PUB. POL. 375 (1999) 13
MICHAELSEN, PIETY IN THE PUBLIC SCHOOL (1970) .. 8, 11
OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION ASSEMBLED MAY 4TH, 1853 TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS, Vol II 10
THE COLLECTED WORKS OF ABRAHAM LINCOLN (1953) .. 9

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INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Petitioners pursuant to Rule 37.3 of this Court.[1] The Becket Fund is a bipartisan and interfaith public-interest law firm that protects

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[1]All parties have consented to the filing of this brief. The letter of consent of the Solicitor General accompanies this brief, and consent letters from all other parties are on file with this Court. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus*, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

the free expression of all religious traditions. In *Boyette v. Galvin*, No. 98-CV-10377 (D. Mass. filed Mar. 3, 1998), we represent parents challenging Massachusetts' 1854 "Anti-Aid" Amendment to its constitution, adopted at the height of the anti-Catholic and nativist "Know-Nothing" movement, on the grounds that it was based on irrational animus and violates our clients' Equal Protection and First Amendment rights.

Our *amicus* brief traces the historical origins of the principle barring aid to institutions that are "sectarian," and demonstrates how this concept grew out of the nativist and anti-Catholic bigotry of the 19th and early 20th century. Because of this focus, we believe our brief will complement, and not duplicate, the briefs of the parties and thus prove helpful to the Court in its resolution of this case.

SUMMARY OF THE ARGUMENT

In holding portions of a program under Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 7301, *et seq.*, unconstitutional, the Court of Appeals relied on the now-familiar determination that the private schools involved in the neutral education program were "sectarian." *Helms v. Picard*, 151 F.3d 347, 374 (5th Cir. 1998). There is good reason to doubt the continuing validity of this type of analysis. To aid the Court in reconsidering it, this brief sets forth the legal history of the term "sectarian."

The origins of the inquiry into a school's "sectarian" character are found not in the history of the Establishment Clause, but in a dark period in our history when bigotry against immigrants–particularly Catholic immigrants–was a powerful force in state legislatures. To the policymakers in the mid-19th century, "sectarian" did not mean the same thing

as "religious." It was instead an epithet applied to those who did not share the "common" religion taught in the publicly funded "common" schools.

As the Catholic population in the United States grew, "sectarian" took on an even more precise, and more pejorative, meaning. In response to the waves of immigration in the 19th century, Nativist groups such as the Anti-Catholic and anti-immigrant Know-Nothing Party grew in size and political power. These groups sought to ensure the ascendancy of their view of the common religion of the United States in the common schools and keep out "sectarian" competition, enacting measures such as requiring the reading of the King James Bible in public schools, and enacting measures barring any public funds going to "sectarian" schools.

The "Blaine Amendment" to the Federal Constitution, named after the notoriously Anti-Catholic presidential candidate James G. Blaine who proposed the measure in 1874, would have prevented any government funds from being used by "sectarian" (mainly Catholic) schools. The measure failed in Congress by a narrow margin, but by the early decades of the Twentieth Century, most states had either adopted, or had forced upon them by their Enabling Acts, similar provisions nick-named in Blaine's honor. As the Arizona Supreme Court recently observed, commenting on its own "Blaine Amendment", "The Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing Catholic menace." *Kotterman v. Killian*, 972 P.2d 606, 624 (Az. 1999) (citation omitted), *petition for cert. filed*, 67 U.S.L.W. 3671 (U.S. Apr. 26, 1999).

Court decisions of the late 19th and early 20th century demonstrate well the targets of Blaine Amendments. They routinely held that the prohibition on funding "sectarian" schools did not prohibit funding public schools that were religious, only schools with religions that conflicted with the common Protestant hegemony. As one court observed, "It is said that the King James Bible is proscribed by Roman Catholic authority; but proscription cannot make that sectarian which is not actually so." *People ex rel. Vollmar v. Stanley*, 255 P. 610, 617 (Colo. 1927); *see also State v. Scheve*, 93 N.W. 169, 172 (Neb. 1903) (overruling motion for rehearing) (constitutional prohibition against sectarian instruction "cannot, under any canon of construction with which we are acquainted, be held to mean that neither the Bible, nor any part of it, from Genesis to the Revelation, may be read in the educational institutions fostered by the state.").

When, following the incorporation of the Religion Clauses against the States, this Court began to inquire into whether government aid could go to "pervasively sectarian" schools, it was not inventing a new analytical category. The Court was instead borrowing a well-established one. Whether a school was "sectarian," and thus presumptively disqualified from receiving state aid, was a question that had been asked routinely for over a century, though not by the federal courts. Whether a school was sectarian was the question traditionally asked by the Nativist Movements of the Nineteenth Century and the state Blaine Amendments they spawned.

As Justice Thomas has recently noted, the notion of "pervasively sectarian" as an analytical category is becoming increasingly isolated in this Court's jurisprudence.

> We no longer require institutions and organizations to renounce their religious missions as a condition of participating in public programs. Instead, we have held that they may benefit from public assistance that is made available based upon neutral, secular criteria. [*Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986)]. Furthermore, the application of the "pervasively sectarian" test in this and similar cases directly collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity.

Columbia Union College v. Clark, 119 S. Ct. 2357, 2358 (1999) (mem.) (Thomas, J., dissenting from denial of *certiorari*) (footnote and citation omitted)

In short, both the nature and the vocabulary of the inquiry into a school's "sectarian" character are ideas with a past. They are outdated and offensive and should be abandoned.

ARGUMENT

In holding portions of a program under Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 7301, *et seq.*, unconstitutional, the Court of Appeals relied on a determination that the private schools involved in the neutral education program were "sectarian." *Helms v. Picard*, 151 F.3d 347, 374 (5th Cir. 1998). That holding was based on this Court's precedents denying aid to "pervasively sectarian" institutions. We respectfully suggest that the Court reexamine those precedents in light of both the

Court's more recent cases and the history of the term "sectarian." Because we believe that others are fully briefing the legal developments, this brief focuses on the relevant history.

I. LEGAL INQUIRY INTO A SCHOOL'S "SECTARIAN" CHARACTER ORIGINATED IN THE RELIGIOUS CONFLICTS OF THE NINETEENTH CENTURY

A. Nineteenth Century "Common Schools" Inculcated Students with the Protestant "Common Religion," Thus Distinguishing Themselves From "Sectarian" Schools

Legal inquiry into a school's "sectarian" or "nonsectarian" character began in the mid-Nineteenth Century, when those labels were terms of art. In the northeast States, the birthplace of the "common school," there was an ongoing religious debate between the Unitarian and Orthodox divisions of the Congregational faith. *See, e.g., Hale v. Everett*, 53 N.H. 9, 111 (1868) ("the great mass of our people . . . were Congregationalists . . . . Such was their Christianity and their Protestantism, as was that of most of the New England states"). *See also The Dublin Case*, 38 N.H. 459 (1859) (describing the history of the Congregational Church and the conflicts between the Unitarians and Trinitarian/Orthodox in New England).

A desire to make peace between these factions, together with the emerging principle of universal education, led to the creation of "nonsectarian common schools," first in Massachusetts and then elsewhere. But "nonsectarian" in this sense did not mean nonreligious. It meant schools that taught

religious doctrine acceptable initially to all Congregationalists, and, later, to most Protestants.[2] When Horace Mann developed his system of common, nonsectarian schools, the conflict he addressed was that between Orthodox and Unitarian Congregationalists.[3] E.I.F. WILLIAMS, HORACE

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[2]"Our fathers were not only Christians; they were, even in Maryland by a vast majority, elsewhere almost unanimously, Protestants" *Hale*, 53 N.H. at 111 (quoting 2 Bancroft's Hist. U.S. 456). *See also Stevenson v. Hanyon*, 7 Pa. Dist. R. 585, 589 (1898) ("Christianity is part of the common law of this State [Pennsylvania]"); *Warde v. Manchester*, 56 N.H. 508, 509 (1876) ("[T]he protestant religion is regarded with peculiar favor, ...").

[3]Responding to the charges that he sought the removal of religion, and the Bible in particular, from the common schools, Mann issued a statement on "Religious Education" in his Report on Education for 1948. HORACE MANN, LIFE AND WORKS: ANNUAL REPORTS OF THE SECRETARY OF THE BOARD OF EDUCATION OF MASSACHUSETTS FOR THE YEARS 1845-1848, 292-340 (1891):

> But it will be said that this grand result in practical morals is a consummation of blessedness that can never be attained without religion, and that no community will ever be religious without a religious education. Both these propositions I regard as eternal and immutable truths.

Id. at 292. Thus, the "Father of Public Education" himself vehemently denied that he "ever attempted to exclude religious instruction from school, or to exclude the Bible from school, or to impair the force of that volume." *Id.* at 311.

MANN: EDUCATIONAL STATESMAN 266 (1937); *see also* R. MICHAELSEN, PIETY IN THE PUBLIC SCHOOL 69 (1970) ("Horace Mann scorned sectarianism. By that he meant chiefly the sectarianism of the evangelical Protestant denominations.").

In the period before the great waves of Catholic immigration were felt, even this Court itself presumed that to be the definition of "sectarianism." In *Vidal v. Girard's Ex'rs*, 43 U.S. 127 (1844), Justice Story asked rhetorically, in response to the assertion that Christianity could not to be taught by laymen in a college:

> Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college–its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, *not sectarian*, upon the general evidence of Christianity, from being read and taught in the college by lay-teachers? . . . . Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament?

Id. at 200 (emphasis added). Thus, the Court took for granted the proposition that, in 1844, the "common religion" was not sectarian. Other religions were.

Instead, he describes the public school system at that time as building "its morals on the basis of religion; it welcomes the religion of the Bible." *Id.* Mann wanted religion in the common schools–so long as it was of the "common," "non-sectarian" variety.

B. A Backlash Against 19th Century Irish and East-European Immigration Led To A Variety of Official Manifestations of Anti-Catholic Bigotry, Including the So-Called Blaine Amendments, Directed at "Sectarian" Schools.

Between 1830 and 1870, the emergence of the public school movement coincided with a surge of Irish, German and other European Catholic immigration. The popular backlash against the immigrants fueled an anti-Catholic bigotry that lasted until the early decades of the Twentieth Century. The anti-immigration forces created the "Nativist" movement, a Protestant reaction against Catholic participation in society, particularly in the educational systems.

One of the most prominent, and earliest, nativist groups was the Know-Nothing party, which "included in its platform daily Bible reading in the schools." *Lemon v. Kurtzman*, 403 U.S. 602, 629 (1971) (citation omitted). Abraham Lincoln wrote of that party:

> "As a nation we began by declaring that 'all men are created equal.' We now practically read it, 'all men are created equal, except Negroes.' When the Know-Nothings get control, it will read 'all men are created equal except Negroes and foreigners and Catholics.' When it comes to this, I shall prefer emigrating to some country where they make no pretense of loving liberty."

Letter from Abraham Lincoln to Joshua Speed (Aug. 24, 1855), reprinted in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 320, 323 (R. Basler ed., 1953).

The Know-Nothings gained control of both houses of the legislature and the governorship of Massachusetts in 1854, JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925 at 88 (1987), and quickly went to work implementing their agenda. They passed a law requiring the reading of the King James Bible in the "common" schools and established a "Nunnery Investigating Committee." *Id.* The Know-Nothings also adopted an amendment to the Massachusetts Constitution barring any part of the common school fund to be "appropriated to any religious sect for the maintenance exclusively of its own school." MASS. CONST. Amend. Art. XVIII (superseded by MASS. CONST. Amend. Art. XLVI). The amendment's proponents were open about their motives:

> "Sir, I want all our children, the children of our Catholic and Protestant population, to be educated together in our public schools. And if gentlemen say that the resolution has a strong leaning towards the Catholics, and is intended to have special reference to them, I am not disposed to deny that it admits of such interpretation. I am ready and disposed to say to our Catholic fellow-citizens: 'You may come here and meet us on the broad principles of civil and religious liberty, but if you cannot meet us upon this common ground, we do not ask you to come."

OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION ASSEMBLED MAY 4TH, 1853 TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS, Vol II at 630 (Mr. Lothrop).

The development of this "lowest common

denominator" Protestantism also led to an anomalous, but telling battle in Cincinnati between the "common religionists" and a group of Catholics, Jews and freethinkers that opposed Protestant devotional Bible[4] reading. *See Board of Education v. Minor*, 23 Ohio St. 211 (1872). Protestant opposition to the removal of their Bible from the public schools was fierce and clearly anti-Catholic. *See* MICHAELSEN at 118 ("the Dutch Reformed *Christian Intelligencer* denounced the Cincinnati board's action as a move to 'hand the public schools over to Pope, Pagan, and Satan.'")

Likewise, in New York City the Public School Society, which was supported by tax funds, included "nonsectarian" religious instruction in its curriculum. *See Lemon v. Kurtzman*, 403 U.S. 602, 628 (1971) (Douglas, J., concurring) ("Early in the 19th century the Protestants obtained control of the New York school system and used it to promote reading and teaching of the Scriptures as revealed in the King James version of the Bible."); MICHAELSEN at 85 ("But in certain practices–such as the use of the King James version of the Bible and certain other literature–the society gave a definite Protestant and even anti-Catholic tone to education under its direction."). The ensuing half-century battle eventually led to the adoption, at the Constitutional Convention of 1894, of a so-called "Blaine Amendment."

Blaine Amendments take their name from Representative James G. Blaine, who in 1875, introduced in

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[4]*See also State ex rel. Finger v. Weedman*, 226 N.W. 348, 351 (S.D. 1929) ("The King James version is a translation by scholars of the Anglican church bitterly opposed to the Catholics, apparent in the dedication of the translation, where the Pope is referred to as 'that man of sin.'").

the U.S. House of Representatives a proposed constitutional amendment that would have barred states from giving school funds to sectarian schools.[5] After Blaine's amendment barely failed in the Congress[6], state after state either voluntarily adopted similar "Blaine Amendments" to their constitutions,[7] or were forced by Congress to enact such

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[5]JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925 at 138-139 (1987). The amendment read:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

Id.

[6]The measure passed the House 180-7 but fell four votes short of the Senate. Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 38 (1992).

[7]*See, e.g.*, N.Y. CONST. Art. XI § 3 (adopted 1894); DEL. CONST. Art. X § 3 (adopted 1897); KY. CONST. § 189 (adopted 1891); MO. CONST. Art. IX § 8 (adopted 1875).

Articles as a condition of their admittance into the Union.[8] There were no illusions about the purpose of such amendments: "[C]ontemporary sources labeled the amendment part of a plan to institute a general war against the Catholic Church." *Kotterman*, 972 P.2d at 624 (citation omitted);[9] *Nevada ex rel. Nevada Orphan Asylum v.*

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[8]*See, e.g.*, Act of Feb. 22, 1889, 25 Stat. 676, ch. 180 (1889) (enabling legislation for South Dakota, North Dakota, Montana and Washington); Act of June 20, 1910, 36 Stat. 557 § 26 (1910) (enabling act for New Mexico and Arizona); Act of July 3, 1890, 26 Stat. L. 215 § 8, ch. 656 (1890) (enabling legislation for Idaho); S.D. CONST. Art. VIII § 16; N.D. CONST. Art. 8, § 5; MONT. CONST. ART. X § 6; WASH. CONST. Arts. IX § 4, Art. I § 11; ARIZ. CONST. Art. IX § 10; IDAHO CONST. Art. X § 5.

[9]A modern awareness of this history is reemerging:

> The Protestant paranoia fueled by waves of Catholic immigration to the U.S., beginning in the mid-nineteenth century, cannot form the basis of a stable constitutional principle. And the stability of the principle has been undermined by the amelioration of those concerns. From the advent of publicly supported, compulsory education until very recently, aid to sectarian schools primarily meant aid to Catholic schools as an enterprise to rival publicly supported, essentially Protestant schools.

Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 NOTRE DAME J. OF LAW, ETHICS & PUB. POL. 375, 386 (1999); Laycock, *The Underlying Unity of*

Hallock, 16 Nev. 373, 385 (1882) ("The framers of the [Nevada] constitution undoubtedly considered the Roman Catholic a sectarian church.").

Many prominent people threw their weight behind the effort. In 1875, President Grant spoke of the Catholic Church as a source of "superstition, ambition and ignorance." President Ulysses S. Grant, Address to the Army of Tennessee at Des Moines, Iowa (quoted in Laycock, 46 EMORY L.J. at 51). Institutions were formed to fight Catholic interference with the Protestant public school system. *See Derry Council, No. 40 , Junior Order United American Mechanics v. State Council of Pennsylvania*, 47 A. 208, 209 (Pa. 1900) (purposes of the Junior Order of United American Mechanics of the United States of North America included "to maintain the public-school system of the United States, and to prevent sectarian interference therewith; to uphold the reading of the Holy Bible therein"). A succession of anti-Catholic organizations continued to oppose Catholic education and influence, using the various tools of the state legislature, Congress, and the judiciary. In the 1890s, the "American Protective Association" was politically successful in inciting anti-Catholic hatred. KINZER, AN EPISODE IN ANTI-CATHOLICISM 139 (1964) ("For good or bad, accurately or not, its name was well known and its initials identified

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Separation and Neutrality, 46 EMORY L.J. 43, 50 (1997) ("[T]he nineteenth century movement was based in part on premises that were utterly inconsistent with the First Amendment. Although there were legitimate arguments to be made on both sides, the nineteenth century opposition to funding religious schools drew heavily on anti-Catholicism."). *See also Kotterman*, 972 P.2d at 624-25; *Boyette v. Galvin*, No. 98-10377 (D. Mass. filed Mar. 3, 1998) (challenge to state's anti-sectarian constitutional provision).

almost any activity or proposal that could by any stretch of the imagination be called anti-Catholic.").[10] Even the cartoonists at *Harper's Weekly* put in their two cents. One example, out of a great many, is reproduced in the appendix to this brief.

C. Nineteenth and Early Twentieth Century State Court Litigation Reinforced the Distinction Between "Common" and "Sectarian" Schools.

The Blaine Amendments resulted in a wave of state-court litigation firmly establishing the notion that Catholic

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[10]Oath No. Four of the APA began:

> I do most solemnly promise and swear that I will always, to the utmost of my ability, labor, plead and wage a continuous warfare against ignorance and fanaticism; that I will use my utmost power to strike the shackles and chains of blind obedience to the Roman Catholic Church from the hampered and bound consciences of a priest-ridden and church-oppressed people; that I will never allow any one, a member of the Roman Catholic Church, to become a member of this order, I knowing him to be such; that I will use my influence to promote the interest of all Protestants everywhere in the world that I may be; that I will not employ a Roman Catholic in any capacity if I can procure the services of a Protestant.

HUMPHREY J. DESMOND, THE A.P.A. MOVEMENT, A SKETCH 36 (1912).

"sectarian" schools were unable to share in neutral education programs benefitting the "common" schools. Blaine Amendments, and other Blaine-like provisions, were frequently used to strike down programs such as bus transportation for parochial school students, *see, e.g., Judd v. Board of Education of Union Free School Dist.*, 15 N.E.2d 576 (N.Y. 1938), payment for orphans at a Catholic asylum, *Nevada ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373 (1882), payment for tuition at an "industrial school for girls," *Cook Cy. v. Chicago Industrial School for Girls*, 18 N.E. 183 (Ill. 1888), and provision of textbooks and other supplies for parochial school students, *Smith v. Donahue*, 195 N.Y.S. 715 (N.Y. App. Div. 1922).

Meanwhile, Catholics who happened to teach in the public schools were forbidden to wear religious garb. *O'Connor v. Hendrick*, 77 N.E. 612 (N.Y. 1906). And when Catholic children attending public schools complained about the Protestant doctrine taught there, their charges went unanswered by the courts. While the Catholic Church forbade its faithful from reading the King James version of the Bible,[11]

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[11]As the California Supreme Court described the religious differences between the King James (Protestant) and Douay (Catholic) versions of the Bible:

> The Douai version is based upon the text of the Latin Vulgate, the King James version on the Hebrew and Greek texts. There are variances in the rendering of certain phrases and passages. The Douai version incorporates the Apocrypha, which are omitted from the texts of the Testaments in the King James version.

courts continued to hold that the reading of that translation was *not* sectarian instruction.[12] *See People ex rel. Vollmar v. Stanley*, 255 P. 610, 617 (Colo. 1927) ("It is said that King James Bible is proscribed by Roman Catholic authority; but proscription cannot make that sectarian which is not actually so."), *overruled by Conrad v. City of Denver*, 656 P.2d 662 (Colo. 1983).

Other courts were more candid about their intent to keep Protestant religious instruction in the public schools, and "sectarian" ideas out:

> The plaintiff's position is that, by the use of the school-house as a place for reading the Bible, repeating the Lord's prayer, and singing religious songs, it is made a place of worship, and so his children are compelled to attend a place of worship, and he, as a tax-payer, is compelled to pay taxes for building and repairing a place of worship.

Evans v. Selma Union High School Dist., 222 P. 801, 802-03 (Cal. 1924). *See also State ex rel. Finger v. Weedman*, 226 N.W. 348, 350-53 (S.D. 1929) (discussing conflict between Catholics and Protestants over Bible reading). *See also People ex rel. Ring v. Board of Education of Dist. 24*, 92 N.E. 251, 254 (Ill. 1910) ("Catholics claim that there are cases of willful perversion of the Scriptures in King James' translation.").

[12]The Bible was read devotionally, not simply used for its literary or historical merit, as it is today in some public schools. *See State ex rel. Finger v. Weedman*, 226 N.W. 348 (S.D. 1929) ("[W]e emphasize that in our opinion the reading of the Bible and repeating of the Lord's Prayer without comment in opening exercises is necessarily devotional.").

> . . . . The object of the provision [IOWA CONST. art. 1, § 3], we think, is not to prevent the casual use of a public building as a place for offering prayer, or doing other acts of religious worship, but to prevent the enactment of a law whereby any person can be compelled to pay taxes for building or repairing any place designed to be used distinctively as a place of worship.
>
> . . . . Possibly, the plaintiff is a propagandist, and regards himself charged with a mission to destroy the influence of the Bible. Whether this be so or not, it is sufficient to say that the courts are charged with no such mission.

Moore v. Monroe, 20 N.W. 475, 475-76 (Iowa 1884). Ironically, in a later decision, that court enjoined a school district from providing funds to a public school operating in the same building as a Catholic parochial school–while explicitly reaffirming its decision in *Moore*. *Knowlton v. Baumhover*, 166 N.W. 202, 214 (Iowa 1918). *See also Kaplan v. Independent School Dist.*, 214 N.W. 18, 20 (Minn. 1927) (in upholding Bible reading: "We are not concerned with nice distinctions between sects, nor as to how among them the different authorized versions of the Bible are regarded.").

The claims of a group of Catholics and Jews against a public school board which conducted religious exercises including the reading of the King James Bible and recitation of the Lord's Prayer were dismissed when the Texas Supreme Court held that such exercises did not render the school sectarian. *Church v. Bullock*, 109 S.W. 115, 118 (Tex. 1908) ("Christianity is so interwoven with the web and woof of the state government that to sustain the contention that the

Constitution prohibits reading the Bible, offering prayers, or singing songs of a religious character in any public building of the government would produce a condition bordering upon moral anarchy."). The Kansas Supreme Court justified its holding that the reading of the Lord's Prayer[13] and the Twenty-Third Psalm did not constitute "sectarian or religious doctrine" by stating that the public schools had an obligation to teach morals and ideals to its students, and "the noblest ideals of moral character are found in the Bible." *Billard v. Board of Education*, 76 P. 422, 423 (Kan. 1904). And daily religious services at a Methodist College were held by the Kentucky Court of Appeals not to constitute "sectarian instruction." *Commonwealth v. Board of Educ. of Methodist Episcopal Church*, 179 S.W. 596, 598 (Ky. 1915). *See also Hackett v. Brooksville Graded School Dist.*, 87 S.W. 792, 793 (Ky. 1905); *State v. Scheve*, 93 N.W. 169, 172 (Neb. 1903) (overruling motion for rehearing) (constitutional prohibition against sectarian instruction "cannot, under any canon of construction with which we are acquainted, be held to mean that neither the Bible, nor any part of it, from Genesis to the Revelation, may be read in the educational institutions fostered by the state."); *Tash v. Ludden*, 129 N.W. 417, 421 (Neb. 1911) ("This is a Christian country, Nebraska is a Christian state, and its normal schools are Christian schools; *not sectarian*, nor what would be termed religious schools; . . . .") (emphasis added).

These requirements were enforced. *McCormick v. Burt*, 95 Ill. 263 (1880) (affirming judgment against Catholic plaintiff who was suspended for not observing Bible reading rule); *Spiller v. Inhabitants of Woburn*, 12 Allen 127 (Mass. 1866) (court upheld student's "exclusion" from school for

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[13] *See Ring*, 92 N.E. at 254 ("The Lord's Prayer is differently translated in the two versions.").

refusing to bow her head during public school prayer). *Cf. North v. Board of Trustees of University of Illinois*, 27 N.E. 54 (Ill. 1891) (mandatory chapel exercises, the avoidance of which resulted in the expulsion of the Plaintiff from the State university, did not violate the Illinois constitution).

In short, the common schools could be as religious as they wanted, so long as the religion in question was "common." It was only "sectarian" schools that could not receive public funds.

II. THIS COURT SHOULD RECONSIDER ITS ADOPTION OF THE "NO-AID-TO-SECTARIAN-SCHOOLS" RHETORIC AS AN ANALYTICAL CATEGORY.

Following the incorporation of the Religion Clauses against the States, this Court began examining whether State aid to religious schools and religious school students was constitutional under the First Amendment. The effort began in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), at a time when the "common" public schools were still flourishing. The rhetoric of challenging aid to "sectarian" institutions–the prohibited category under state Blaine Amendments–was taken up, perhaps uncritically, into First Amendment litigation.[14]

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[14]It is interesting that the challenged aid to parochial school students in *Everson* involved a program in New Jersey, the constitution of which had an Establishment-like Clause, a Conscience Clause and other provisions, but no Blaine Amendment or other similar anti-sectarian language in its constitution. Thus, in order to challenge the transportation

In *Lemon v. Kurtzman*, the Court struck down legislation in Rhode Island and Pennsylvania permitting salary supplements to parochial school teachers in order to bring their wages closer to public school teachers. 403 U.S. 602 (1971). The opinion focused on the "sectarian" character of the recipient rather than on the purpose of the laws to improve educational opportunities for all children, not merely those in public schools. *Id.* at 615 ("The school buildings contain identifying religious symbols such as crosses on the exterior and crucifixes, and religious paintings and statues either in the classrooms or hallways."). Justice Douglas' concurrence was more blunt:

> In the parochial schools Roman Catholic indoctrination is included in every subject. History, literature, geography, civics, and science are given a Roman Catholic slant. The whole education of the child is filled with propaganda. That, of course, is the very purpose of such schools, the very reason for going to all of the work and expense of maintaining a dual school system. *Their purpose is not so much to educate, but to indoctrinate and train, not to teach Scripture truths and Americanism, but to make loyal Roman Catholics.* The children are regimented, and are told what to wear, what to do, and what to think.

Id. at 635 n.20 (quoting L. BOETTNER, ROMAN CATHOLICISM

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program at issue, it was necessary for the plaintiffs in that case to urge upon the Court a federal prohibition against neutral aid on the grounds that the students receiving the aid attended a category of disqualified, *i.e.*, sectarian, schools.

360 (1962)) (emphasis added); *see also Board of Education of Central School Dist. No. 1 v. Allen*, 392 U.S. 236, 251 (1968) (Black, J., dissenting) ("The same powerful sectarian religious propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion.") (footnote omitted)).

Aid directly to students has also repeatedly been struck down as unconstitutional simply because the funds would be used to support "sectarian institutions." *See Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 783 (1973) (partial reimbursement of private school expenses and tax deduction invalid because the "effect" was "to provide desired financial support for nonpublic, sectarian institutions"); *Meek v. Pittenger*, 421 U.S. 349, 366 (1975) (upholding textbook loans; striking down other auxiliary services and instructional aids as aid to "religion-pervasive institutions."); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 385 (1985) ("Given that 40 of the 41 schools in this case are thus 'pervasively sectarian,' the challenged public-school programs operating in the religious schools may impermissibly advance religion . . . ."); *id.* at 397 ("The state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense.").

This Court's more recent cases focus not on the character of the institution a child attends but on the character of the decision to provide aid. As Justice Thomas has recently noted, this leaves the notion of "pervasively sectarian" as an analytical category increasingly isolated.

> We no longer require institutions and organizations to renounce their religious missions as a condition of participating in public programs. Instead, we have held that they may benefit from public assistance that is made available based upon neutral, secular criteria. [*Agostini v. Felton*, 521 U.S. 203 (1997), *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993), *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986)]. Furthermore, the application of the "pervasively sectarian" test in this and similar cases directly collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity.

Columbia Union College v. Clark, 119 S. Ct. 2357, 2358 (1999) (mem.) (Thomas, J., dissenting from denial of *certiorari*) (footnote and citation omitted). We respectfully suggest that it is time to abandon the term "sectarian." It is an unhelpful analytical category and an epithet with a reprehensible past.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

HARPER'S WEEKLY at 383, May 8, 1875